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No. 02-

IN THE

Supreme Court of the United States

MARIA PULICE,

Petitioner,

v.

OFFICER J. ENCISCO; SGT. T.M. SOLLA; OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR.; in their capacity as police officers and individually; ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency; ALLEGHENY TOWNSHIP, a municipal corporation; PEOPLE'S NATURAL GAS COMPANY, a Pennsylvania corporation; PAUL E. KING, a Pennsylvania State Trooper,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for theThird Circuit

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether a court, when confronted with a qualified immunity defense in a motion for summary judgment, in an action under §1983, is to make factual determinations that are subject to dispute.

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PETITION FOR A WRIT OF CERTIORARI

Maria Pulice respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App., infra, 1a-8a) is reported at 89 Fed. Appx. 692, *; 2002 U.S. App. LEXIS 14443, * (3rd Cir. 2002). The opinion of the court of appeals on petition for rehearing (App., infra, 44a-45a) is not reported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion affirming the opinion of the district court, and subsequently denied rehearing and rehearing en banc. Petitioner invoked this Court's jurisdiction under 28 U.S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

United States Constitution Amendment IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutory Provisions Involved:

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Statement of Facts

On December 4, 1997, Peoples Natural Gas Company sought to perform work on a gas line that was located on Maria Pulice's property. Ms. Pulice and her husband challenged the utility company's right to be on their property. As a result of the dispute the Peoples Natural Gas Company employees did not perform the work on the line that was located on the Pulice property.

Sometime after the dispute arose, the Peoples Natural Gas Company contacted Allegheny Township Solicitor Bernard Matthews, Jr., Esquire. Mr. Matthews forwarded a letter to Peter Payne, Esquire, who was representing Ms. Pulice and her family in regard to the dispute. In said letter, the solicitor informed Mr. Payne that his clients would be arrested if they refused to cooperate with the gas company.

On December 5, 1997, Peoples Natural Gas Company again sought to perform work on Pulice's property that was the subject of the dispute. The Allegheny Township police department was notified and several officers were dispatched to the scene of the dispute. When Ms. Pulice and her family refused to retreat from their position that Peoples Natural Gas Company was not permitted on the land, they were arrested and taken into custody by the Allegheny Township police officers.

While she was being arrested and placed in handcuffs, Pulice was manhandled and treated with excessive force that

resulted in injuries to her person. Such injuries resulted from Ms. Pulice being thrown to the ground, handcuffed, and struck with something hard on or about her upper body, shoulders, arms, legs, neck and head. As a result of the officer's conduct, Ms. Pulice sought and received medical treatment for her injuries.

B. Course of Proceedings and Disposition Below

The Petitioner filed this action pursuant to 42 U.S.C. §1983, alleging, *inter alia*, that the rights to be free from excessive force, as guaranteed by the Fourth Amendment of the United States Constitution, have been violated.

Defendant police officers filed a motion for summary judgment claiming that Petitioner's claim must fail based upon the fact that they were entitled to qualified immunity. The United States District Court for the Western District of Pennsylvania granted Defendant police officers' motion, based upon its finding that they were entitled to qualified immunity.

Petitioner appealed the matter *sub judice* to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the District Court's opinion, ruling that the individual police officers were entitled to qualified immunity. Petitioner moved to have the Third Circuit re-hear the matter or, in the alternative, to hear the matter *en banc*; however, the Petition for such a hearing was denied. It is from this ruling that Petitioner files this Petition.

REASON FOR GRANTING THE WRIT

A. The Court of Appeals for the Third Circuit, in affirming the Decision of the District Court, has improperly sanctioned the utilization of a Standard of Review, in those cases involving qualified immunity, where a Motion for Summary Judgment has been made, which does not comport with the decisions of this Court and the applicable Federal Rules of Civil Procedure.

1. The Standard of Review applied to the Motion for Summary Judgment was improper.

Both the district court and the court of appeals made factual determinations regarding matters that were contested and subject to dispute. Further, both the district court and the court of appeals made determinations regarding the weight, which certain matters were given and relied upon such determinations to grant the motion for summary judgment. Included among those determination made were that Petitioner reached for a gun that was in a police officer's holster, that Petitioner posed a threat and a danger to the police officers, that a threat was present, that the police were justified in using force against the Petitioner, that such force was necessary, even though the Petitioner was on the ground and that the injuries that Petitioner suffered were not severe enough to support Petitioner's contention that the police officers used excessive force. Each of the identified determinations was subject to dispute and Petitioner would argue were not viewed in a light that was most favorable to her.

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.

R. Civ. P. 56(c). In ruling on a motion for summary judgment, the evidence of the non-movant must be believed and all justifiable inferences must be drawn in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1996).

Although the non-movant may not rely solely on his pleadings, but must demonstrate the existence of a genuine issue of material fact by pointing to "specific facts" that create such an issue, *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), Petitioner contends that she has pointed to such facts. Petitioner has offered evidence that she presented herself for medical treatment, obtained medical treatment, was identified as having bruises and provided testimony that she was taken into custody, subdued and placed on the ground. Additionally, Petitioner testified that, after she was subdued and placed on her stomach, she was struck and beaten from behind repeatedly with hard objects by the officers.

Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Albiero v. City of Kankakee*, 246 F.3d 927.932 (7th Cir. 2001). Petitioner suggests that she has proffered such specific facts and has established that there are genuine issues of fact that are to be left for a trial, but nevertheless the district court and court of appeals have disposed of her claim.

Petitioner suggests that the district court and the court of appeals have made factual determinations with respect to disputed and contested facts. Further, Petitioner argues that the courts have made determinations regarding the weight and credibility of evidence that has been presented by the Petitioner, which is inappropriate at the summary judgment level. "[C]redibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,255 (1986).

Petitioner suggests that the district court and the court of appeals have gone against precedent established by this Court with respect to a court's role in ruling on motions for summary judgment. Further, Petitioner claims that the court's willingness to make factual determinations, not in the light most favorable to the non-moving party, goes against the clear command set forth in the Federal Rules of Civil Procedure.

2. The District Court and Court of Appeals misapplied the holding of *Saucier v. Katz*, 533 U.S. 194 (2001), to determine that the police officers were entitled to Summary Judgment.

Petitioner contends that the district court and court of appeals relied too heavily upon the decision rendered in *Saucier v. Katz*, 533 U.S. 194 (2001), as opposed to merely applying the two-step analysis set forth in *Saucier*. Petitioner would suggest that *Saucier* was not a reformation of the qualified immunity analysis. Instead, *Saucier* stressed that a trial court must engage in the two-part analysis (asking first whether a constitutional right was violated and second whether that right was clearly established) before it engages in other analysis. *Garvin v. Wheeler*, 2002 U.S. App. LEXIS 17788 (7TH Cir. 2002). Petitioner argues that both the district court and the court of appeals failed to apply this two-step standard appropriately and in light of the standard of review, which is to be applied when ruling on a motion for summary judgment.

The doctrine of qualified immunity generally shields state actors from liability under 42 U.S.C. §1983 based on their discretionary acts. *Anderson v. Creighton*, 483 U.S. 635,638-640 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800,818 (1982). As noted by this Court qualified immunity entitles its possessor to "immunity from suit rather than a mere defense to

liability. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Thus, governmental officials have some freedom to perform tasks associated with their duties, without concern that they might be subject to suit. *Wyatt v. Cole*, 504 U.S. 158,167 (1992). Nevertheless, governmental actors could lose this immunity when they violate clearly established constitutional rights of which a reasonable person should have known. *Anderson*, 483 U.S. at 638-69.

Qualified immunity strikes a balance between the need to provide a means for the vindication of constitutional guarantees and the societal costs that inhere in litigation against public officials, including "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). It does so by shielding public officials from liability for civil damages if their actions were objectively reasonable, as evaluated in the context of legal rules that were 'clearly established' at the time." *Kalka v. Hawk*, 215 F.3d 90,98 (D.C. Cir. 2000)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity is more than a simple defense -- it is "an entitlement not to stand trial or face the other burdens of litigation, . . . an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. 511, 526 (1985). As a result, the Supreme Court has made clear that "where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194 (2001).

Where a court is faced with determining whether an official is entitled to qualified immunity, a two part inquiry

must be made. The threshold question is whether, "taken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. By addressing this question first, a court serves the important role of providing a clear standard against which officers can measure the legality of future conduct. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (noting that "if the policy of avoidance [of determining constitutional issues] were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals").

If a court determines that the officer's conduct did not violate a constitutional right, the analysis stops and the matter proceeds no further because the officer is entitled to qualified immunity. *Saucier*, 533 U.S. 201. Where, however, a court finds otherwise--that a constitutional violation did occur--it must then proceed to "ask whether the right was clearly established" at the time it was allegedly infringed. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202; *Hope v. Pelzer*, 536 U.S. ___, 153 L. Ed. 2d. 666 (2002) ("The salient question . . . is whether the state of the law [at the time of the challenged conduct] gave [the officers] fair warning that their alleged treatment of [the plaintiff] was unconstitutional."). As such, if the government agent's conduct violated a right, the court must analyze the objective reasonableness of the agent's belief in the lawfulness of his actions.

If the officer reasonably believed that his actions did not violate the plaintiff's rights, the officer is entitled to qualified immunity even if that belief was mistaken. *Malley v. Briggs*,

475 U.S. 335, 341 (1986) ("[T]he qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). If his belief was not objectively reasonable, qualified immunity offers him no solace and the plaintiff's claims must be allowed to proceed. *Harlow*, 457 U.S. 818-819. Petitioner asserts that it was not objectively reasonable for the officers to strike her with hard objects after she was placed on the ground and subdued. The reasonable officer would have no reason to strike an elderly person, who has been placed under control, with a hard object on or about her back, neck and shoulders.

The determinations by the lower courts that the officers acted reasonable, was improper and relied upon the courts making factual determinations, where the facts were not viewed in the light most favorable to Petitioner. Rather, the facts were viewed in a light most favorable to the moving party, whereby the officer's version of the events were adopted--although disputed.

Petitioner argues that the policy rational for providing qualified immunity, to shield officials from the rigors of trial and liability, does not apply to the matter *sub judice*, and more importantly that the balance does not require that the district court, which hears a motion for summary judgment based upon the defense of qualified immunity, make a "reach" to provide such immunity. While Petitioner recognizes the policy rational behind qualified immunity, such a policy should not be utilized by a court as a means to deny Petitioner, and other similarly situated persons, their day before a jury.

Petitioner suggests that the facts in this matter are subject to dispute and that the courts erred by accepting, as true, the version offered by the officers. Should the decisions of the district court and court of appeals be permitted to stand, the doctrine of qualified immunity will have been, in effect,

converted to an absolute immunity--which is improper. The reality of Fourth Amendment excessive force cases is that many of the facts are in dispute and the appropriate body to make the factual determinations is the jury and not the court, even though there is a desire to protect the officials from the burdens of the trial process. As such, the reasonableness prong of the qualified immunity analysis is often a factual determination, which should be left to the finder of fact.

Even after *Katz*, Courts have found that:

> "reasonableness under the Fourth Amendment should remain a question for the jury. To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to be sure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared."

Douglas v. Public Safety Comm'n, 2002 U.S. Dist. LEXIS 17293,*27-28; citing *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999).

Accordingly, the determination of objective reasonableness is particularly fact-based and, when accounts differ, requires credibility determinations among witnesses to assess the propriety of an officer's actions. Such determinations are matters for the jury, and not the court. *Vaugh v. City of Lebanon*, 18 Fed. Appx. 252, 266 (6th Cir. 2001) citing *Headwaters Forest Defense v. County of Humboldt*, 240 F.2d 1185, 1198 (9th Cir. 2001).

A Fourth Amendment claim of excessive force is analyzed under the framework set forth by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). That analysis requires balancing the "nature and quality of the intrusion" on a

person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. 490 U.S. at 386. Determining whether an officer's use of force was reasonable or excessive therefore "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force. *Id.* *see Deorle v. Rutherford*, 272 F.3d 1272, 1279-81 (9th Cir. 2001).

And while this Court has instructed:

> "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,'" violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

Graham v. Connor, 490 U.S. 376,396-97 (1989), Petitioner would suggest that she was not the victim of just a "push or shove." Petitioner argues that the force to which she was

subjected was not the type that the Supreme Court was referring to, when it wrote such language. Petitioner was struck repeatedly about the back of the neck, head and shoulder with hard objects even after she was placed face down on the ground. There is a material issue of fact that remains as to whether the force utilized by the officers, after Petitioner was placed face down on the ground, was reasonable.

Although courts have identified that even where some degree of force is necessary, they have also found that gratuitous acts against a person who has been seized might violate the Fourth Amendment's reasonableness standard. *Phelps v. Coy*, 286 F.3d 295, 297, 301-02 (6th Cir. 2002)(recognizing the necessity of analyzing defendant's use of force against plaintiff helps "in segments" where defendant arrested plaintiff, placed him in handcuffs, took him to the police station for booking, and then beat him after he raised his leg in a manner that plaintiff perceived to be a threat to another police officer); *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2002) (it would be clear to reasonable officer that use of pepper spray was excessive where arrestee was under control, had surrendered, and was rendered helpless).

Petitioner contends that she was subjected to such gratuitous acts of violence. Even if this Court were to find that some force was necessary to take Petitioner into custody, Petitioner suggests that the officers went beyond the acceptable level of force needed. Petitioner contends that the right of the officers to use the type and extent of force that was utilized against her was beyond the scope of what a reasonable officer would have utilized in light of the fact that Petitioner had been forced upon the ground and subdued. The need to utilize hard objects, to strike Petitioner, after she was subdued raises a question of need and would present a triable question as to whether such conduct was punitive in nature.

Petitioner recognizes that the officers deny her version of the events. The conflicting stories, Petitioner suggests, is an issue that is most appropriately left for a jury and should not be ruled upon by a court in a motion for summary judgment.

As Justice Ginsburg wrote:

> "[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, Graham will not permit summary judgment in favor of the defendant official. And that is how it should be. When a plaintiff proffers evidence that the official subdued her with a chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had."

Saucier v. Katz, 533 U.S. 194,216 (Ginsburg, J. concurring in judgment). A position, which the Third Circuit had previously taken in *Groman v. Manalapan*, 47 F.3d 628 (3d Cir. 1995).

Cases, such as the one brought to this Court, nearly always require a jury to sift through disputed factual contentions, and draw inferences therefrom, Courts have held on many occasions that summary judgment in excessive force cases should be granted sparingly. *Liston v. County of Riverside*, 120 F. 3d 965, 976, n.10 (9th Cir. 1997); *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002) (striking plaintiff's head against car after plaintiff had been handcuffed establishes a violation because no reasonable officer could have thought force was necessary in light of the fact that plaintiff had been handcuffed and subdued.)

Until a jury resolves the disputed issues concerning events that occurred on a particular occasion, the court cannot determine as a matter of law the reasonableness of the officer's use of force or his good faith belief, or lack thereof, in the

reasonableness of his conduct. *Karnes v. Skutski*, 62 F.3d 485, 491-92 (3d Cir. 1995).

Finally, Petitioner would add that her inability to point to a factual scenario exactly like the one that she was subjected to cannot be fatal to her case against the officers. *Hope v. Pelzer*, 536 U.S. ____, 153 L. Ed. 2d 666 (2002)(noting that to do so "would create perverse incentives indeed if a **qualified immunity** defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.").

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No: 01-3748

MARIA PULICE

Appellant

v.

OFFICER J. ENCISO; SGT. T.M. SOLLA; OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR., in their capacity as police officers and individually; ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency; ALLEGHENY TOWNSHIP, a municipal corporation; PEOPLES NATURAL GAS COMPANY, a Pennsylvania corporation; PAUL E. KING, Pennsylvania State Trooper

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 99-cv-01244)
District Judge: Honorable Donald J. Lee

Argued May 2, 2002

Before: ROTH and STAPLETON, *Circuit Judges*
POLLAK,* *District Judge*

(Opinion filed : July 17, 2002)

NOT PRECEDENTIAL

* Honorable Louis H. Pollak, District Court Judge for the Eastern District of Pennsylvania, sitting by designation

OPINION

ROTH, Circuit Judge:

Plaintiff Maria Pulice appeals the District Court's grant of summary judgment dismissing her claims brought against defendants, Officer Enciso et. al, under 42 U.S.C. § 1983. We agree with the District Court that Ms. Pulice has failed to produce record evidence of a genuine issue of material fact from which a reasonable jury could rule in her favor on any count, and that the defendant Officers are entitled to qualified immunity. Thus, for reasons explained in more detail below, we will affirm the District Court's entry of summary judgment in favor of defendants.

I. Facts and Procedural History.

The underlying dispute arises from Ms. Pulice's opposition to an easement on her property. The easement allows the Peoples Natural Gas Company to provide gas to Ms. Pulice's neighbors by running and servicing a pipe and gas meter on her property and on the public right of way along her property. This suit is not the first litigation over easements. In 1993, the Court of Common Pleas of Westmoreland County, Pennsylvania granted a permanent injunction forbidding the Pulices from interfering with Peoples' right of way on the Pulice's property. The permanent injunction was affirmed on appeal.

Problems resumed on December 4, 1997, however, when Peoples was called to service the gas line because it had been cut by appellant's husband, Nunziato Pulice, Sr. The Pulices refused to allow Peoples to enter their property, and, as a result, the gas company contacted the Allegheny Township Police Department. The Township faxed a letter to the Pulice's lawyer, instructing him that his clients were not to interfere with the gas company's right of way. When Peoples returned the next day, however, it was still barred from the property by

the Pulices. It then called the Allegheny Township Police to the scene.

Officer Donald Hess told the Pulices that they would be arrested if they continued to obstruct Peoples. The Pulices did not budge, and the officers proceeded to arrest them. As the officers were removing Nunziato Pulice from the scene, Ms. Pulice attempted to grab the gun from Officer Enciso's holster. The officers responded by subduing and handcuffing her. Ms. Pulice claims that she was thrown face down on the ground, and beaten with a hard object. Medical reports, however, show only a bruise on her back and leg and an abrasion on her left hand. This incident was videotaped by the Pulices' neighbor, Clark Keller.

As a result of her actions, Ms. Pulice was charged with disorderly conduct under 18 Pa. C.S. § 5502(a)(1), resisting arrest under 18 Pa. C.S. § 5104, simple assault under 18 Pa. C.S. § 2701(a)(3), and obstructing a public passage under 18 Pa. C.S. § 5507(a). She ultimately pled guilty to simple assault and obstructing a public passage. She was.sentenced to one year of probation and ordered to undergo a mental health evaluation.

Ms. Pulice wrote a letter to Paul Evanko, the Pennsylvania State Police Commissioner, to complain that she had been beaten by the defendant Officers. Trooper Paul King was assigned to investigate this matter and, after reviewing the videotape of the Pulice's arrest and interviewing many witnesses, he filed a charge of False Reports to Law Enforcement Agencies against Ms. Pulice. This charge was ultimately dismissed at a habeas corpus hearing in the Court of Common Pleas of Allegheny County, Pennsylvania.

As a result of her arrest and prosecution, Ms. Pulice filed a § 1983 suit in federal court. She named as defendants Officers Enciso, Hess, and two other officers (in their capacity as police

officers and individually), as well as Allegheny Township, the Allegheny Township Police Department,[1] the Peoples Natural Gas Company, and Trooper King. Her complaint alleged that the defendant Officers violated her rights under the First, Fourth, Fifth and Fourteenth Amendments, that the Township was also liable for the defendant Officers' actions, and that the defendant Officers conspired with Peoples and Trooper King to violate her civil rights.

After discovery, the District Court entered summary judgment dismissing Pulice's § 1983 claims and dismissing her pendent state law claims without prejudice. This appeal followed.

II. Jurisdiction and Standard of Review.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. 1343(a)(3). We have appellate jurisdiction, under 28 U.S.C. § 1291, over the District Court's final order granting summary judgment for defendants.

The District Court's grant of summary judgment is subject to plenary review. *Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975, 978 (3d Cir. 1993). When ruling on summary judgment, inferences to be drawn from underlying facts in the evidentiary record must be viewed in the light most favorable to the plaintiff. *Id.* Federal Rule of Civil Procedure 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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[1] Ms. Pulice has not pursued her claims against the Police Department on appeal.

III. Discussion.

A. Claims against Defendant Officers.

Ms. Pulice appeals the District Court's decision to grant summary judgment on the following claims brought against the defendant Officers: Excessive force claims brought under the Fourth, Fifth, and Fourteenth Amendments; retaliation claims or exercise of her rights under the First Amendment; and false arrest, false imprisonment, and malicious prosecution claims. As explained below, we will affirm the District Court's decision to grant summary judgment on all of these claims.

1. Excessive force claims.

We agree with the District Court that the defendant Officers are entitled to qualified immunity from Ms. Pulice's claim that they violated the Fourth Amendment by using excessive force during her arrest.[2] The Supreme Court has made clear that courts addressing qualified immunity for an excessive force claim must resolve the following two questions: First, when the facts are taken in the light most favorable to the plaintiff, do they show that the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, is the right clearly established insofar as a reasonable official would understand that his actions are violating that right? *Id.* at 202.

According to the undisputed facts of this case, as Nunziato Pulice was being arrested, Maria Pulice attempted to take the gun from Officer Enciso's holster. The officers responded by subduing and handcuffing her. Ms. Pulice claims that she was

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[2] We agree with the District Court that Ms. Pulice's excessive force claims are not separately cognizable as violations of the Fifth and Fourteenth Amendments' due process clauses, *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

thrown face down on the ground, and beaten with a hard object. Almost all of this altercation was recorded on videotape. Medical reports show only a bruise on her back and leg and an abrasion on her left hand.

In applying the *Saucier* test to these facts, the District Court found that it was reasonable for the officers to conclude that they were acting with an appropriate amount of force when they subdued Ms. Pulice as they did.

The Supreme Court has noted that "not every push or shove" violates the Fourth Amendment and that the right to use a certain degree of force must be analyzed in light of the "facts and circumstances of each particular case, including the severity of crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest." *Graham*, 490 U.S. at 96. In this case the bulk of the facts and circumstances surrounding Ms. Pulice's arrest have been recorded on videotape. In light of the videotape and the facts, we agree with the District Court that the officers' actions in subduing Ms. Pulice after she attempted to take Officer Enciso's gun did not violate a clearly established constitutional right. Under the circumstances, the officers were justified in reacting as they did to Ms. Pulice's actions and no unreasonable force was employed. *See Saucier*, 121 U.S. at 2159-60.

2. Retaliation claim.

We also agree with the District Court that the facts underlying Ms. Pulice's retaliation claim fail to establish a violation of her First Amendment rights. A First Amendment retaliation claim requires a plaintiff to prove three things: first, that she engaged in protected activity; second, that the government responded with retaliation; third, that this protected activity was the cause of the government's retaliation. *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997).

Ms. Pulice claims that she was arrested in retaliation for standing on her property and pronouncing her views that the Gas Company was not entitled to enter. She has failed, however, to provide a factual basis for her retaliation claim. She was not arrested for expressing her views, but because she and her husband acted unlawfully when they physically obstructed the Gas Company's right of way. Thus, we will affirm the District Court's grant of summary judgment for this claim.

3. False arrest, false imprisonment and malicious prosecution claims.

Under §1983, false arrest, false imprisonment, and malicious prosecution claims require a showing that the arrest, physical restraint, or prosecution was initiated without probable cause. We agree with the District Court that Ms. Pulice failed to proffer facts showing a lack of probable cause for her arrest, physical custody, and prosecution: There is no dispute that she obstructed Peoples' access to a valid right of way and that such obstruction is a misdemeanor under Pennsylvania law. *See* 18 Pa. C.S. § 5507. We will affirm the District Court's grant of summary judgment on these claims.

B. Claims against Allegheny Township.

Ms. Pulice also appeals the District Court's grant of summary judgment on her claims against Allegheny Township. She claims that the Township should be held liable for the defendant Officers' actions taken pursuant to the Township's policies. In light of our conclusion that the defendant Officers did not violate a constitutional right, however, we will affirm the District Court's dismissal of claims against the Township.

C. Conspiracy claims against Trooper King and Peoples Gas Company.

Finally, Ms. Pulice appeals based on her claims that both Trooper King and the Peoples' Gas Company conspired with the defendant Officers to violate her constitutional rights. We agree with the District Court that Ms. Pulice failed to produce sufficient evidence of an agreement to overcome summary judgment on her conspiracy claims. We therefore affirm the District Court's dismissal of these claims.

IV. Conclusion.

Ms. Pulice has failed to provide sufficient evidence to overcome summary judgment on any of her § 1983 claims. We will affirm the District Court's order dismissing these claims on summary judgment.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 01-3748

MARIA PULICE

Appellant

v.

OFFICER J. ENCISO; SGT. T.M. SOLLA;
OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR.,
in their capacity as police officers and individually;
ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal
agency; ALLEGHENY TOWNSHIP, a municipal corporation;
PEOPLES NATURAL GAS COMPANY, a Pennsylvania
corporation; PAUL E. KING, Pennsylvania State Trooper

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 99-cv-01244)
District Judge: Honorable Donald J. Lee

Argued May 2, 2002

Before: ROTH and STAPLETON, *Circuit Judges*
POLLAK,* *District Judge*

JUDGMENT

This case came on to be heard on the record before the United States District Court and was argued on May 2, 2002;

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* Honorable Louis H. Pollak, District Court Judge for the Eastern District of Pennsylvania, sitting by designation

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated September 21, 2001, be and the same is hereby affirmed. Costs taxed against appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Kathleen Brauner
Acting Clerk

Dated: July 17, 2002

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1244

MARIA PULICE,

Plaintiff,

v.

OFFICER J. ENCISO, SGT. T.M. SOLLA, OFFICER DANIEL UNCAPHER, CHIEF DONALD HESS JR., in their capacity as police officers and individually and the ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency and ALLEGHENY TOWNSHIP, a municipal corporation, PEOPLES NATURAL GAS COMPANY, a Pennsylvania corporation, and PENNSYLVANIA STATE TROOPER PAUL E. KING,

Defendants.

MEMORANDUM OPINION

September 20, 2001

Presently, before the Court are the following:

(i) **"Motion by Paul E. King for Summary Judgment"** (*Document No. 90*), with brief in support thereof (*Document No. 91*), and Plaintiff's reply and brief in opposition thereto (*Document No. 100*);

(ii) **"Motion For Summery Judgment"** filed by Officer J. Enciso, Sgt. T.M. Solla, Officer Daniel Uncapher, and Chief Donald Hess, Jr. (*Document No. 92*), with brief in support

thereof (*Document No. 93*), and Plaintiff's response and brief in opposition thereto (*Document Nos. 104 and 106*);

(iii) **"Defendants' Motion for Summary Judgment"** filed by Allegheny County Township and Allegheny Township Police Department (*Document No. 95*), with brief in support thereof (*Document No. 96*), and Plaintiff's reply and brief in opposition thereto (*Documents No. 102 and 103*); and

(iv) **"Motion for Summary Judgment"** filed by The Peoples Natural Gas Company (*Document No. 97-1*), with brief in support thereof (*Document No. 97-2*); Plaintiff's Reply and Brief in opposition thereto (*Document Nos. 107 and 108*); and Defendant The Peoples Natural Gas Company's Reply Brief (*Document No. 110*).

After careful consideration of the motions, the material in support of and in opposition thereto, the memoranda in support of and in opposition thereto, the relevant case law, and the record as a whole, the Court finds that there is no record evidence such that a reasonable jury could return a verdict for Plaintiff, Maria Pulice, on the federal claims alleged and, therefore, will grant defendants' motions as to all federal claims alleged and dismiss without prejudice any and all of Plaintiff's alleged pendent state claims.

Background

Plaintiff, Maria Pulice ("Pulice"), has brought this lawsuit pursuant to title 42, United States Code, section 1983, against The Peoples Natural Gas Company ("Peoples Gas"), several individual Allegheny Township police officers ("Defendant Officers"), and the Allegheny Township Police Department, Allegheny Township, and Paul E. King, a Pennsylvania State Trooper ("Trooper King"). Pulice alleges her civil rights were violated on December 5, 1997, when she and two other members of her family were arrested by officers of the

Allegheny Township Police Department.[1] Pulice also "invokes pendant jurisdiction of [the] Court to hear and decide claims arising out of the laws of the Commonwealth of Pennsylvania." Amended Complaint, ¶ 2.

Pulice alleges that Peoples Gas "acted under color of law by their (sic) conspiracy with co-defendants to violate Pulice's First, Fourth, Fifth and Fourteenth Amendment Rights." Pl's Br. at 3 (Document No. 108).

Pulice alleges that Defendant Officers violated her "First, Fourth, Fifth and Fourteenth Amendment rights under the Constitution as follows: failure to comply with the police procedures, assault and battery, use of excessive force, threat of deadly force, misuse of a weapon, intentional infliction of emotional distress, false arrest, failure to obtain a warrant, false imprisonment and malicious prosecution." Pl's Br. at 3 (Document No. 105).

Pulice alleges that the Defendant Township and Defendant Police Department are liable under theories of vicarious liability, respondeat superior, negligence in hiring, training, supervision or discipline and disregard of the Defendant Police Officers' vicious propensities. (Amended Complaint at ¶ 42).

Pulice alleges that Defendant Pennsylvania State Trooper Paul E. King ("Trooper King") conspired with the other named defendants to violate her constitutional rights when he charged Pulice with false reports to law enforcement authorities. It is not clear from the Amended Complaint (i) whether Pulice is alleging a second, separate conspiracy involving King and (ii) what constitutional rights of Pulice were infringed by the alleged conspiracy involving Trooper King.

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[1] Although Pulice's husband and son were arrested with her on December 5, 1997, they have not joined in this action.

Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows:

> [Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In interpreting Rule 56(c), the United States Supreme Court has stated:

> The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must view the facts in a light most favorable to the non-moving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. *Id.* at 242. The "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.'" *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d

Cir. 1978), *quoting Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870. 874 (3d Cir. 1972). Final credibility determination on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. *Josey v. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' – that is, pointing out to the District Court – that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1230. When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is "merely colorable" of "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

"One of the most common forms of evidence used on a summary judgment motion is affidavits . . . in support of or opposition to a Rule 56 motion . . ." Wright, Miller & Kane, 10A Federal Practice and Procedure, § 2722, at 54. Hearsay evidence contained in affidavits and deposition testimony may be sufficient to survive summary judgment motion unless such evidence clearly would not be admissible at trial. *Clark v. Commonwealth of Pennsylvania*, 885 F. Supp. 694, 709 n.3 (E.D. Pa. 1995) (citing *Petruzzi's IGA Supermarkets*, 998 F.2d at 1234 n.9).

The stringent standard which courts apply to Rule 56 motions includes the requirement that documents, filed in support of and in opposition to the motion, must be of such a quality as to be admissible at trial. *Kohr v. Johns-Manville Corp.*, 534, F. Supp. 256, 257-58 (E.D. Pa. 1982) (citing *First Nat'l Bank Co. v. Insurance Co. of North America*, 606 F.2d 760, 766 (7th Cir. 1976); *Sims v. Mack Truck Corp.*, 488 F. Supp. 592, 602 (E.D. Pa. 1980).

A plaintiff may not rest upon mere allegations to defeat summary judgment. Indeed a party opposing summary judgment must do more that rest upon mere allegations, general denials, and vague statements. In this matter, while Pulice cites to various deposition transcripts, her response to Defendants' motions for summary judgment is largely a series of unsubstantiated conclusory statements. At this late date in the proceedings, Pulice's case rests almost entirely on the allegations set forth in her Amended Complaint.

Discussion

Pulice and her husband, Nunziato Pulice, Sr., own two adjacent parcels of property situate in Allegheny Township, Westmoreland County, Pennsylvania. One parcel contains 34.9 acres, the other 0.114 acres. The smaller parcel ("subject parcel") was conveyed to the Pulices by Anthony J. Bonadio and Frances Bonadio, his wife, by Deed of Exchange dated May 12, 1979, and recorded in Westmoreland County Deed Book Volume 2322, page 404. (Deed of Exchange, Peoples Gas App., Ex. 6 (Document 99)).

In 1976, the Bonadios granted a right of way, over the parcel which eventually was conveyed to the Pulices, to Peoples Gas dated September 17, 1976 and recorded October 28, 1976 in Westmoreland County Deed Book 2230, page 897. The right of way includes the right to maintain an eight-inch natural gas pipeline, together with "other equipment" on the

subject property. (Peoples Gas Right of Way, Peoples Gas App., Ex. 7 (Document 99)).

Additionally, three years prior to conveying their property to the Pulices, the Bonadios granted their neighbors, Clark and Lois Keller, an easement to install a gas line and meter on the subject property and granted Peoples Gas the right of access to service the installation and reading of the meter. The instrument dated October 18, 1976, provides that the Kellers have the right to construct on the subject property:

> a domestic high pressure regulator and meter installation and the right to lay a service line from said installation across the said property to Clark Keller and Lois Keller, his wife, property line. I also agree that The Peoples Gas Company shall have the right of ingress and egress for the purpose of servicing the installation and reading the meter.

Keller Right of Way, Peoples Gas App., Ex. 8 (Document 99).

The Kellers did not record this document, but the Bonadios' deed to the Pulices specifically mentions the Kellers' easement. Moreover, both the gas line and meter were clearly visible when the Pulices bought the property.

Prior to 1992, the Pulices attempted to prevent Peoples Gas from gaining access to the gas line and meter on the subject property by covering the meter with a wooden box. *See* Defendant Officers' App., Exh. T, Depo. of Nunziato Pulice Sr. (Document No 94).[2] As a result of the Pulies' conduct, Peoples

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[2] Nunziato Pulice Sr. testified as follows:

> I say, I don't want nobody to come in on the property. And I put a box on top of the meter, and the judge got made and put an injunction, and it was a fight because he didn't want to take it out.

Defendant Officers' App., Exh. T, Depo. Nunziato Pulice Sr. (Document No. 94).

Gas filed a Complaint in Equity in Westmoreland County, Pennsylvania, and requested an injunction to stop the Pulices from preventing Peoples Gas from reading the meter and otherwise servicing the area.

Following a hearing on the matter, the Honorable Daniel J. Ackerman granted a preliminary injunction and ordered the Pulices to remove the wooden box from the gas meter on their property. *See* Defendant Officers' App., Exh. E, Order of Court dated June 25, 1992 (Document No 94).

On or about September 30, 1993, the Honorable Donetta W. Ambrose, then a judge of that court, held an additional hearing. Following the hearing, the court issued its Findings of Fact, Conclusions of Law and an Order of Court granting the request of Peoples Gas for a permanent injunction and giving it the legal right of ingress and egress onto the Pulices property for the purpose of reading the meter and servicing the gas line to the Keller property. *See* Findings of Fact and Conclusions of Law and Order of Court entered on December 16, 1993, by the Court of Common Pleas of Westmoreland County, Pennsylvania, No. 4087 C.D. 1992 (Peoples Gas App., Exh. No. 14).

The Pulices appealed the Order issued by the Court of Common Pleas. The Superior Court of Pennsylvania affirmed the trial court's order, noting in its opinion that the deed between the Pulices and Bonadios specifically mentions the right of way at issue and that the injunction to enjoin the Pulices from "their petty behavior" was properly granted. *See* Memorandum Opinion of Superior Court of Pennsylvania, entered August 31, 1995, No. 1235 Pittsburgh 1994, 668 A.2d 1204 (Pa. Super. 1995), *alloc. denied*, 674 A.2d 1074 (Pa. 1995) (table) (Peoples Gas App., Exh. No. 15).

In early December 1997, the Kellers discovered they were without natural gas service. It was discovered that Nunziato

Pulice Sr. had cut the gas line with a back hoe. *See* Peoples Gas App., Ex 1, Depo of Nunziato Pulice.[2]

On December 4, 1997, employees of Peoples Gas went to the gas line located on or near the Pulice property along Copeland Road in Allegheny Township, Leechburg, Pennsylvania. They intended to service the line connection and restore the Kellers' gas service. Because of the prior problems with the Pulice family, Peoples Gas chose to relocate its meter from the Pulice property to the berm of Copeland Road, within the township right of way and off the Pulice property. However, Maria Pulice and her sons, Nunziato Jr. and Francesco, were blocking the area with their pickup truck and with their bodies. The Pulice family refused to permit the employees of Peoples Gas to do their work. Pulice's son called the police, as did the employees of Peoples Gas. The Allegheny Township police arrived and asked Peoples Gas to leave the scene, at which time the Peoples Gas crew left.

At some point on December 4, 1997, Allegheny Township Solicitor Bernard Matthews, Esquire, learned of the problems Peoples Gas was having with servicing the line and was asked to provide advice to the Allegheny Township police on how to proceed. Attorney Matthews prepared and faxed a letter to Peter Payne, Esquire, the Pulices' attorney at the time, advising that Copeland Road is a township road pursuant to 53 P.S. § 67307 of the Second Class Township Code and according to township maps. Attorney Matthews further advised that Peoples Gas was conducting operations in the public right-of-way of Copeland Road and instructed the Pulices' attorney that

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[2] In his deposition, Nunziato Pulice Sr. testified as follows:

Q; Did the judge make Mr. Keller move his gas line?

A; No, I move (sic) it for Mr. Keller personally, with the backhoe, in my property. I went and busted the line.

Peoples Gas App., Ex. 1, Depo of Nunziato Pulice, at 125.

further interference with the activities of Peoples Gas could subject the Pulices to arrest.

The employees of People Gas returned to Copeland Road on December 5, 1997. Again, the employees were met at the area by Maria Pulice and her son, Nunziato Jr. Mrs. Pulice's husband, Nunziato Sr., was also there. The Pulices physically blocked the access to the area where Peoples Gas needed to work. The Allegheny Township police were called to the scene and attempted to resolve the situation without success. However, when the Pulices refused to move, defendant Chief Donald Hess Jr. advised them they were under arrest.

When the Pulices refused to move, the officers proceeded to take them into custody beginning with Nunziato Pulice Sr. As the police attempted to remove him from the scene, Maria Pulice is seen on videotape attempting to pull him back.[3] *See also* Maria Pulice's deposition testimony (Vol. I), p. 28 and 98, Exhibit Q (Document No. 94). Once the officers removed him from the immediate area, the videotape shows Maria Pulice going back up the hill and grabbing on of the officers who is attempting to remove her son from the hill.

Gary Bier, an employee of Peoples Gas, testified at a hearing before District Justice Raymond Casper that her heard

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[3] On both December 4 and 5, 1997, the Kellers' son William E. Keller, used a videocamera to film the ongoing dispute between the Pulices and Peoples Gas. A copy of the videotape was attached as Exhibit H to the Defendant Officers' Motion to Dismiss and is incorporated by reference to the Defendant Officers' Motion for Summary Judgment. The videotape shows the ongoing discussion between the Pulices, the employees of Peoples Gas and the Allegheny Township police officers. The Pulices can be seen and heard arguing vehemently with the police and requesting proper documentation from the employees of Peoples Gas for access to their property.

one of the officers yell "She's got my gun!"[4] Mrs. Pulice was then removed from the hill, placed face down and handcuffed.

Maria Pulice was charged with disorderly conduct pursuant to 18 Pa. C.S. § 5502(a)(1), resisting arrest pursuant to 18 Pa. C.S. § 5104, simple assault pursuant to 18 Pa. C.S. § 2701(a)(3), and obstructing a highway or other public passage pursuant to 18 Pa. C.S. § 5507(a). Pulice pled guilty to simple assault and obstructing a highway or other public passage. She was placed on adult probation for one (1) year and was ordered to undergo a mental health evaluation.

After her arrest, Pulice wrote a letter to Pennsylvania State Police Commissioner Paul Evanko complaining about her alleged beating by the Allegheny Township police. State Police Corporal David Lieberum ("Lieberum") was assigned to investigate the allegations. Pulice, in the presence of her attorney, was interviewed by Lieberum on January 20, 1998. During the interview, Pulice stated that, during her arrest, she was kicked in the head and struck with batons by the Allegheny Township police.

Trooper Paul King was assigned to continue the state police investigation. King's investigation consisted of interviewing the people who were present at the incident on December 5, 1997. Trooper King interviewed all of the Allegheny Township police officers who were present during the incident. All the officers stated that no physical abuse was inflicted upon Pulice and each denied kicking Pulice or striking her with a baton.

Trooper King also interviewed Gary Bier, Greg Myers, Daniel Peppler, Douglas Peppler, and Laverne Iams, the

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[4] The officer can be heard on the videotape yelling for assistance because Pulice has her hands on his gun. On the videotape, Pulice can be seen clearly grabbing the officer in the area of his gun.

employees of Peoples Gas who were present during the incident. Each of these employees stated that Pulice was neither beaten or struck with a baton nor did anything occur during the incident of December 5, 1997, that amounted in their opinion to abuse by the police.

Trooper King also watched the Keller videotape of the incident, and saw no sign of physical abuse on the part of the Allegheny Township police.[5]

After conducting the interviews and watching the videotape, Trooper King filed a charge of False Reports to Law Enforcement Authorities against Pulice on October 27, 1999.[6] The criminal complaint and affidavit of probable cause were served upon Pulice by mail.

A preliminary hearing was held before Senior District Magistrate Raymond Casper on November 17, 1999. The charge was bound over to the Court of Common Pleas of Allegheny County, Pennsylvania. A habeas corpus hearing was held on March 20, 2000, following which the charge against Pulice was dropped.[7]

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[5] The Court has also reviewed the video recording of the incident and it has observed no physical abuse on the part of the Allegheny Township police. *Cf. Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. at 2151, 2161 (2001) (Ginsburg, J., concurring) (concurring in majority's decision to reject plaintiff's claim of excessive force after viewing television news videotape of incident).

[6] Pulice filed her original Complaint on August 4, 1999. On June 15, 2000, she amended her Complaint joining Trooper King as a defendant.

[7] The summary judgment record does not indicate the basis for the dismissal of the charge of False Reports to Law Enforcement Authorities filed by Trooper King.

Discussion

A. *Claims Against the Allegheny Township Police Department*

The Allegheny Township Police Department is entitled to judgment as a matter of law on all of Pulice's claims, as the Police Department is not a separate legal entity that can be sited apart from Allegheny Township. "Because all suits, including those brought under Section 1983, growing out of activities of a department of [Allegheny Township] must be brought in the name of [Allegheny Township], an action against the police department cannot be maintained." *Zamichieli v. Stott,* 1999 WL 447311, at *3 (E.D. Pa. July 1, 1999). Therefore, summary judgment will be granted in favor of the Allegheny Township Police Department as to all claims. *See Bonenberger v. Plymouth Twp.,* 132 F.3d 20, 25 *n.* 4 (3d Cir.1997); *Irvin v. Borough of Darby,* 937 F.Supp. 446, 450 (E.D. Pa.1996).

B. *Federal Claims Against The Peoples Natural Gas Company*

Police claims, under § 1983, that Peoples Gas violated her constitutional rights by conspiring with co-defendants to violate her constitutional rights.

Section 1983 of title 42 of the United States Code does not create substantive rights, but provides a remedy for the violation of rights created by federal law. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). A prima facie case under § 1983 requires a plaintiff to demonstrate: (1) a person deprived him or her of a federal right; and (2) the person who deprived him or her of that right acted under color of state or

territorial law. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980).[8] Thus, if there is no violation of a constitutional right, the claim cannot succeed.

Conspiracy with a state actor will subject a private party to liability under § 1983, provided that the state actor played a significant role in the alleged deprivation of rights suffered by the plaintiff. *Rourke v. United States,* 744 F.Supp. 100, 104 (E.D. Pa.1988), *aff'd,* 909 F.2d 1477 (3d Cir. 1990) (table).

Agreement is the sine qua non of a conspiracy. As the Court of Appeals for the Third Circuit has explained, to allege a civil conspiracy for purposes of § 1983, the plaintiff must aver "a combination of two or more persons to do a criminal act, or to do a lawful act by unlawful means or for an unlawful purpose." *Ammlung v. City of Chester,* 494 F.2d 811, 814 (3d Cir.1974); *Spencer v. Steinman,* 968 F. Supp. 1011, 1020 (E.D. Pa.1997). "It is not enough that the end result of the parties' independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism." *Spencer,* 968 F. Supp. at 1020. "[Nor is it] enough to show that the private actors and the state actors might have had a common goal or acted in concert unless there is a showing that they directed themselves toward an unconstitutional action by virtue of a mutual understanding or agreement." *Chiearelli v. Plymouth Garden Apartments,* 551 F.Supp. 532, 539 (E.D. Pa.1982) (citing *Tarkowski v. Hartlett Realty Co.,* 644 F.2d 1204 (7th Cir.1980)).

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[8] Section 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable...

42 U.S.C. § 1983.

Here, the record is completely void of any evidence indicating a mutual understanding or agreement between Peoples Gas and any other co-defendants to violate Pulice's constitutional rights. Rather, Pulice makes the bald assertion

that when employees of Peoples Gas "contacted Defendants Allegheny Township Police officers on both December 4 and then again on December 5; they became willing participants in the unlawful arrest of Plaintiff and her family." Pl's Br. at 6 (Document No. 108). Pulice, however, fails to cite any authority supporting her position that by calling the police Peoples Gas "became willing participants in the joint activity of the police when they deprived Plaintiff of her constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments." Pl's Br. at 8.

Without more in the record, Pulice's assertion is insufficient to show that there was an agreement or mutual understanding between Peoples Gas and any co-defendant to violate Pulice's constitutional rights. As a result, summary judgment will be granted in favor of defendant People Gas on Pulice's § 1983 claim.

C. *Claims Against Officer J. Enciso, Sgt. T.M. Solla, Officer Daniel Uncapher and Chief Donald Hess Jr., in their capacity as police officers and individually ("Defendant Officers")*

Pulice alleges that the Defendant Officers violated her First, Fourth, Fifth and Fourteenth Amendment rights by failing to follow proper police procedures, committing assault and battery, using excessive force, threatening deadly force, misusing a weapon, intentional infliction of emotional distress, falsely arresting and imprisoning her, failing to obtain a warrant, and malicious prosecution.

It is undisputed that the Defendant Officers acted under color of state law in taking every action that is relevant to the instant dispute. Procedurally, therefore, Pulice, has properly asserted her claims for violation of her constitutional rights under 42 U.S.C. § 1983 against the Defendant Officers. However, the Court finds that Pulice's claims fail as a matter of law because (i) she has failed to point to sufficient evidence in the record to establish that the Defendant Officers violated her First, Fifth or Fourteenth Amendment rights; and (ii) the Defendant Officers are entitled to qualified immunity on Pulice's Fourth Amendment claim.

1. *Claim of First Amendment Violations*

The First Amendment to the United States Constitution provides for the freedom of speech, religion, press and assembly. Pulice alleges her First Amendment rights were violated when "all the Defendants did not permit them (sic) to gather on their (sic) own private property and speak concerning the dispute of the second gas line."[9] Pl's Br. at 5 (Document 105). Pulice was arrested for failing to permit Peoples Gas from performing work in the legal right of way on the subject property where it had an easement, as well as within the Township road right of way. Pulice has produced no evidence which supports her claim that her First Amendment rights were violated. Thus, such claim will be dismissed.

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[9] Because of problems with the Pulices, Peoples Gas decided on December 4, 1997, to relocate the Kellers' original meter from the Pulice property and move it to the Allegheny Township right of way along Copeland Road. The summary judgment record indicates that such relocation was completed on December 5, 1997, the day of the incident in question, and the meter has not been relocated since that day. *See* Affidavit of Raymond S. Reed, Peoples Gas App., Ex. 2 (Document 99).

2. *Claim of False Arrest and/or False Imprisonment*

An assertion of false arrest and/or false imprisonment pursuant to 42 U.S.C. § 1983 is determined not by the guilt or innocence of the party who was arrested but by whether the arresting officers had probable cause to believe that the person arrested had committed the offenses. *Dowling v. City of Philadelphia,* 855 F.2d 136, 141 (3d Cir. 1988). An arrest based on probable cause cannot become the source of a claim for false imprisonment. *Baker v. McCollan,* 443 U.S. 137 (1979); *Groman v. Township v. Manalapan,* 47 F.3d 628 (3d Cir. 1995).

In this case, Pulice knew that Peoples Gas had a valid right of way and easement to be on her property to perform work on the gas line which services the Keller residence. When Pulice and members of her family blocked the access of Peoples Gas to the subject property and the Township road right of way, they knew that it was legally entitled to go onto the property to service the line.

When the police officers arrived at the scene on December 5, 1997, they had been advised by Allegheny Township Solicitor Bernard Matthews, Esquire, that Peoples Gas had an easement and a legal right of way to access the property. According to 18 Pa.C.S. § 5507:

> A person, who, having no legal privilege to do so, intentionally or recklessly obstructs any...**public utility right of way**...commits a summary offense, or in case, he persists after warning by a law officer, a misdemeanor of the third degree.

18 Pa.C.S. § 5507(a) (emphasis added). It is undisputed that upon arriving at the scene on December 5, 1997, the Defendant Officers told Pulice and her family they had to move or they would be arrested.

Because Pulice was obstructing a public utility right of way and the Township road right of way in the presence of the Defendant Officers and because Pulice refused to move and desist her behavior after being asked to do so by the police, the police had probable cause to arrest her and legally could do so without a warrant.[10] Hence, because there was probable cause for her arrest, Pulice cannot maintain an action for false arrest and/or false imprisonment and this portion of her Amended Complaint must be dismissed.

3. *Claims of Fifth and Fourteenth Amendment Violations*

A claim of excessive use of force pursuant to 42 U.S.C. § 1983 may implicate either the Fourth or Fourteenth Amendment right to due process. *Graham v. Connor,* 490 U.S. 386, 396-97 (1989). The due process guarantees of the Fourth and Fourteenth Amendments apply where the excessive force involves a seizure, or a non-seizure, respectively. *Graham,* 490 U.S. at 396. Where the excessive force claims arise in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as invoking the protections of the Fourth Amendment. *Graham,* 490 U.S. at 394.

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[10] 42 Pa.C.S. § 8902(1) provides, in relevant part, that a police officer:

> SHALL, upon view, have the right of arrest WITHOUT warrant upon probable cause when there is ongoing conduct that imperils the personal security of any person or endangers public or private property:
>
> (1) Under Title 18 (relating to crimes and offense) when such offense constitutes a summary offense:
>
> . . .
>
> 18 Pa.C.S. § 5507 (relating to obstructing highways and other public passages).

42 Pa.C.S. § 8902(a)(1).

A Fifth Amendment due process claim arising out of a detention should be analyzed under the pre-trial/convicted prisoner due process claims of the Fourth and Eighth Amendments. *Bell v. Wolfish,* 441 U.S. 520, 560 (1979).

In this case, it is undisputed that Pulice's claims arise out of an arrest that took place on December 5, 1997. As Pulice's claims arise out of a situation involving the seizure of her person, she cannot state a claim for a substantive due process violation under the Fifth and Fourteenth Amendments. Therefore, her claims for violations of the Fifth and Fourteenth Amendments will be dismissed.

4. *Claim of Threatened With Deadly Force*

Although Pulice contends that Defendant Hess threatened to kill her son with a gun, Pulice has no evidence that any of the officers threatened to kill her.[11] Because Pulice has no evidence to support her claim of a violation of her civil rights by threat of deadly force, this claim will be dismissed.

5. *Claim of Fourth Amendment Violation -- Excessive Force*

Pulice claims that the Defendant Officers arrested her without probable cause and used excessive force upon her, thereby violating 42 U.S.C. § 1983. In response to these charges, the Defendant Officers assert that they are entitled to qualified immunity. The Court agrees.

Generally, a court must address the claim of qualified immunity of each defendant individually. *See Grant v. City of*

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[11] Pulice alleges that as she was "being beaten and handcuffed by two police officers Pulice's son yelled to Defendant Police Officers to not hurt his mother. Defendant Hess walked over to the Pulice's son and placed his loaded gun to Pulice's son's head and told him to 'shut up or I'll kill you'." Amended Complaint, ¶ 28. At best, the threat that she articulates was only directed at her son and not her.

Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996). However, here the Defendant Officers speak of themselves as a group, and speak of their actions as taken collectively.

The Defendant Officers are represented by the same counsel, and their counsel addresses them as a group. Their motion for summary judgment addresses their entitlement to qualified immunity as a group.

Moreover, Pulice also refers to the Defendant Officers as a group and speaks of their actions as taken collectively. Likewise, Pulice addresses the Defendant Officers' entitlement to qualified immunity as a group.

The court finds it appropriate, under these circumstances, to address qualified immunity of the Defendant Officers as a whole.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz,* 531 U.S. 991, _____, 121 S. Ct. 2151, 2156 (2001) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). Government officials have qualified immunity from suit under § 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sharrar v. Felsing,* 128 F.3d 810, 826 (3d Cir. 1997) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

In *Saucier,* the Supreme Court instructed that the qualified immunity analysis is a two-step process. First, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the defendant's conduct violated a constitutional or statutory right? *Saucier,* 121 S. Ct. at 2156. If no constitutional or statutory right would have been violated by the alleged actions, a defendant has qualified immunity. On the other hand, "if a violation could be made out on a favorable

view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.*

However, qualified immunity applies only in the context of a properly established constitutional violation. Thus, the threshold question that must be addressed before engaging in the qualified immunity analysis is whether Pulice's allegations are sufficient to establish the violation of a constitutional or statutory right at all. *See Saucier,* 121 S. Ct. at 2156; *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Gruenke v. Seip,* 225 F.3d 290, 298 (3d Cir. 2000).

In this case, the Court "will assume that a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances [these Defendant Officers] faced." *Saucier,* 121 S. Ct. at 2159.

Though it appears, based on the summary judgment record, that no excessive force was used, the question is what the Defendant Officers reasonably understood their powers and responsibilities to be, when they acted, under clearly established standards. *Id.*

Pulice's excessive force claim for the most part depends upon her allegations of (i) being "dragged...off their (sic) own private property and into the street," and (ii) being "thrown face down on the ground in the middle of the street, handcuffed and beat." Amended Complaint, ¶¶ 25, 26.

In *Graham v. Connor,* 490 U.S. 386, 396 (1989), the Supreme Court noted that "[o]ur Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to

effect it." Furthermore, in *Graham,* the Supreme Court approved the observation that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id.* "Pushes and shoves, like other police conduct, must be judged under the Fourth Amendment standard of reasonableness." *Saucier,* 121 S. Ct. at 2160.

The right to use a certain degree of force must be carefully analyzed in light of the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest." *Graham,* 490 U.S. at 396.

Applying these standards to the circumstances of the instant case, the Court finds that a reasonable fact finder could not conclude that there was no "reasonable basis" for the Defendant Officers to use the level of force they did when arresting Pulice. The Court finds that the summary judgment record clearly discloses substantial grounds for the Defendant Officers to have concluded they had legitimate justification under the law for acting as they did.

Pulice not only actively resisted arrest, she appears to have attempted to take an officer's weapon, and struggled with the Defendant Officers during the arrests of her husband and son. The videotape and record evidence shows that the Defendant Officers engaged in a lengthy dialogue with the Pulice family prior to their arrests. As Defendant Ness begins to arrest Nunziato Pulice Sr., both Maria Pulice and Nunziato Jr. grab Nunziato Sr. requiring three officers to assist Defendant Ness. As the officers and the Pulice family begin struggling over Nunziato Sr., both Mr. and Mrs. Pulice fall to the ground.

Nunziato Jr. releases his grip on his father's coat and wraps both arms around the visible portion of the vertical gas line.

Three officers then attempt to pull Nunziato Jr. off the gas line. Maria Pulice then climbs up the hill and begins placing her hands on an officer's gun belt. The officer can be heard yelling "hey, hey, she's got my gun, she's got my gun." The situation escalated at this point with Maria Pulice being taken to the ground. She eventually is guided to her feet and handcuffed. Nunziato Jr. lets go of the gas line, is escorted away from the gas line and is handcuffed.

The summary judgment record undisputably shows a situation requiring substantial force to overcome resistance to arrest. Furthermore, when Maria Pulice grabbed the officer's firearm, she immediately threatened the safety of the officers and other persons at the scene. More importantly, the Defendant Officers did not know the extent of the threat she posed.

The summary judgment record evidences circumstances reflecting a degree of urgency. In the circumstances presented, on the record, Pulice has not identified any case demonstrating a clearly established rule prohibiting the Defendant Officers from acting as they did, nor is this Court aware of any such rule. *See Saucier,* 121 S. Ct. at 2160. Therefore, summary judgment will be granted to the Defendant Officers on the grounds of qualified immunity.

6. *Claim of Failure to Comply with Police Procedures*

In Paragraph 39 of her Amended Complaint, Pulice alleges that the Defendant Officers violated her constitutional rights by failing to comply with police procedures. Pulice has produced no evidence to support this allegation. Therefore, Pulice's claim that the Defendant Officers violated her rights by failing to follow police procedures will be dismissed with prejudice.

7. *Claim of Malicious Prosecution*

To establish a claim for malicious prosecution under § 1983, Pulice must demonstrate the following: (i) the Defendant Officers initiated a criminal proceeding (ii) which ended in Pulice's favor, (iii) the criminal proceeding was initiated without probable cause, and (iv) the Defendant Officers acted maliciously or for a purpose other than bringing the defendant to justice. *Heck v. Humphrey,* 512 U.S. 477 (1994); *Montgomery v. De Simone,* 159 F.3d 120, 124 (3d Cir. 1998) (citing *Rose v. Barrie,* 871 F.2d 331, 349 (3d Cir. 1989)). The lack of probable cause is an essential element of this claim. *DiNicola v. DiPaolo,* 25 F.Supp.2d 630, 636 (W.D.Pa. 1998).

The Court of Appeals for the Third Circuit has instructed that the question of probable cause in a section 1983 damage suit is one for the jury and summary judgment is "only appropriate if taking all of [Pulice's] allegations as true and resolving all inferences in her favor, a reasonable jury could not find a lack of probable cause for [Pulice's]...arrest." *Montgomery,* 159 F.3d at 124 (citing *Deary v. Three Un-Named Police Officers,* 746 F.2d 185, 191 (3d Cir. 1984)).

Hence, this court must examine the evidence presented by Pulice on probable cause and, applying any appropriate presumptions, determine whether Pulice has raised a genuine issue of material fact as to whether the Defendant Officers had probable cause to arrest her.

As discussed *supra,* the Defendant Officers had probable cause to arrest Pulice as she committed a misdemeanor offense or offenses, to wit obstructing a public highway or passage and/or a public utility right of way, in their presence. Because the Defendant Officers had probable cause to arrest Pulice, her claim for malicious prosecution will be dismissed.

D. *Claims Against the Allegheny Township, a municipal agency*

Pulice claims that Allegheny Township is liable under title 42, United States Code, section 1983, under the theories of vicarious liability, respondeat superior, negligence in hiring, training, supervision or discipline and disregard of the Defendant Police Officers' vicious propensities. Amended Complaint, ¶ 42.

Local governments and entities may be held liable under § 1983 for constitutional violations caused by an official policy or custom of the municipality. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 694 (1978). Only those municipal officers and employees who have final policymaking authority can by their action subject their municipal employers to § 1983 liability. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 479-80 (1986).

Additionally, the Supreme Court of the United States has held that inadequate training procedures "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris,* 489 U.S. 378, 388 (1989). To meet this deliberate indifference standard, the failure to train must reflect a deliberate or conscious choice made by the municipality. *Id.* at 389.

The Supreme Court in *Collins v. City of Harbor Heights, Texas,* 503 U.S. 115, 120 (1992), made clear that in a municipal liability case, the "proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation."

As comprehensively discussed with respect to the individual liability of Officer J. Enciso, Sgt. T.M. Solla, Officer Daniel Uncapher and Chief Donald Hess Jr., the Court finds that the facts of this case do not support Pulice's claims that her constitutional rights were violated. Thus, it is not necessary to reach the issue of whether Allegheny Township is subject to *Monell* liability where, as here, the Court concludes that no constitutional right was violated.[12] *Searles,* 990 F.2d at 794.

Accordingly, summary judgment will be granted in favor of the Allegheny Township as to Pulice's section 1983 claim.

E. *Claims Against Pennsylvania State Trooper Paul E. King*

Pulice alleges that "Trooper King, when filing charges of False Reports to Law Enforcement Authorities, had an 'understanding' of a 'common purpose' with defendant Police to bring charges against Plaintiff, therefore satisfying the requirements for a conspiracy." Pl's Reply at 6 (Document No. 100).

As discussed *supra,* to establish a § 1983 conspiracy claim, Pulice must show that "persons acting under color of state law conspired to deprive [her] of a federally protected right." *Ridgewood Bd. of Educ. v. N.E. for M.E.,* 172 F.3d 238, 254 (3d Cir. 1999). Here, the record is completely void of any evidence indicating a mutual understanding or agreement between Trooper King and any other co-defendant to violate Pulice's constitutional rights. The Court finds that Pulice's claim fails as a matter of law because she has failed to produce sufficient evidence to establish that Trooper King violated any of her constitutional rights.

Pulice makes the bald assertion that because "Trooper King, without a doubt, would have to speak to the officers" the

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[12] However, the Court notes that there is a dearth of evidence to support Pulice's claim of *Monell* liability against Allegheny Township.

requirements for a conspiracy have been met. However, in his affidavit, Trooper King states:

> 12. At no time during my meeting or discussions with the officers from Allegheny Township did I reach an agreement or understanding that charges would be filed against Pulice. Instead, my actions were taken pursuant to the recommendation from my supervisor, Cpl. Leiberum, that a charge of False Reports be filed against Pulice. This recommendation is reflected on page 2 of his report, a copy of which is attached hereto as Exhibit "A".

King Affidavit, ¶ 12 (Document No. 90).

Exhibit "A" to Trooper King's affidavit is Cpl. David L. Leiberum's report, dated February 3, 1998, stating that it is his "recommendation that a charge of False Reports be filed against Maria Conforti Pulice concerning her allegations of police brutality relative to the incident involving Allegheny Township Police Department." Ex. A. to King Affidavit, at 2 (Document No. 90).

Pulice's unsupported allegation is insufficient to show that there was an agreement or mutual understanding between Trooper King and any co-defendant to violate Pulice's constitutional rights.

Pulice's conspiracy claim also fails because she has failed to demonstrate that she was "seized" under the Fourth Amendment as a result of the charges filed by Trooper King.[13]

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[13] It is notable that in Plaintiff's brief in opposition to Trooper King's summary judgment, she does not point to or touch on any alleged conspiracy on the part of Trooper King to maliciously prosecute her. Therefore, any claim based on malicious prosecution against Trooper King is waived. However, in any event, it appears to the Court that no reasonable jury could find a lack of probable cause in Trooper King's filing of charges against Pulice.

Plaintiff argues she was "seized" because she "had restrictions placed upon her as a result of the issuance of the summons to appear in Court and therefore to answer the state's charges," Pl's Br. at 7 (Document No. 100). The Court of Appeals for the Third Circuit's decision in *Gallo v. City of Philadelphia,* 161 F.3d 217 (3d Cir. 1998), is particularly useful precedent because it provides a detailed analysis of the seizure question in a malicious prosecution case. The *Gallo* court found that the plaintiff had been seized when "he had to post a $10,000 bond, he had to attend all court hearings including his trial and arraignment, he was required to contact Pretrial Services on a weekly basis, and he was prohibited from traveling outside New Jersey and Pennsylvania." *Id.* at 222.

Comparing the restrictions on Gallo's liberty with those in the instant case, it is obvious that Pulice was far less restricted. The only limitation placed upon her through the issuance of the summons, by mail, was to appear in court for the preliminary hearing. Her freedom of movement was not confined to any geographic area. She only had to attend the preliminary hearing where the charge was dismissed against her as compared to Gallo being required to attend an arraignment and trial.

The *Gallo* decision did address the effect of the requirement to attend court hearings upon the plaintiff's liberty and its similarity to a *Terry* seizure.[14] However, the court also addressed how the plaintiff's liberty was restrained because of the bail set, as well as the restraint on his geographic mobility. The court considered the totality of the restrictions on the plaintiff and determined that there was a seizure.

Pulice fails to cite any authority that supports her contention that the restrictions placed upon her as a result of the issuance of the summons to appear in court constituted a seizure under the Fourth Amendment.

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[14] *Terry v. Ohio,* 392 U.S. 1 (1968).

In this matter, given the "restrictions", or lack thereof, placed on Pulice, the Court finds that there was no seizure and Trooper King is entitled to judgment as a matter of law on Pulice's false arrest claim. *See Bristow v. Clevenger,* 80 F.Supp.2d 421 (M.D.Pa. 2000) (finding that plaintiff was not subject to a seizure when she was processed for a criminal record by being fingerprinted and photographed by a detective, she attended a pretrial conference, and she attended a judicial proceeding where her record was expunged after the District Attorney's Office withdrew the criminal charges).

However, assuming *arguendo* that Pulice's receipt of a summons and appearance in court constitute a "seizure" or arrest for purposes of a § 1983 false arrest claim, the record evidence demonstrates that Trooper King is entitled to qualified immunity.

The lack of probable cause is an essential element for Pulice's claim for false arrest.[15] *Groman v. Township Manalapan,* 47 F.3d 628, 634 (3d Cir. 1995) (to prevail on false arrest claim under § 1983, plaintiff would have to prove that the police lacked probable cause to arrest suspect). Whether probable cause exists is generally a question for the jury, but where the uncontroverted facts could not lead a reasonable person to find that probable cause was lacking, the Court may decide the issue. *See Deary v. Three Un-Named Police Officers,* 746 F.2d 185, 190 (3d Cir. 1984).

In this case, the record evidence more than amply supports Trooper King's contention that he had probable cause to charge and arrest Pulice for Filing False Reports to Law Enforcement Authorities. Trooper King interviewed the Allegheny Township officers and the workers from Peoples Gas. All these individuals stated that Pulice was not physically abused. King

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[15] As discussed supra, an essential element of a claim of malicious prosecution is also lack of probable cause.

also reviewed a videotape of the incident and determined that Pulice's allegations could not be substantiated.

Moreover, Pulice concedes in her deposition that she has no evidence to demonstrate that the information contained in the affidavit of probable cause was false or misleading. *See* Pulice Depo. at 46-55. King's App., Document No. 90.

In conclusion, the Court finds that no reasonable jury could find facts on this record that would lead to the conclusion that Trooper King did not have probable cause in charging Pulice with filing false reports to authorities or that Trooper King violated any federal right possessed by Pulice. Therefore, the Court will grant Trooper King's motion for summary judgment.

F. *State Law Pendent Claims*

In Paragraph 2 of her Amended Complaint Pulice "invokes pendant jurisdiction of this Court to hear and decide claims arising out of the laws of the Commonwealth of Pennsylvania."[16] Amended Complaint, ¶ 2.

The Court of Appeals for the Third Circuit has held that if the federal counts are dismissed then the district court should "ordinarily refrain from exercising jurisdiction [over the state law claims] in the absence of extraordinary circumstances." *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 195-96 (3d Cir. 1976). *See also Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) ("Under *Gibbs* jurisprudence, where the claims over which the district court has original jurisdiction are dismissed before trial, the district court must decline to decide the pendent state claims unless consideration of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.") Given that defendants' motion will be granted on the federal claims in this case, and

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[16] The Court notes that Pulice did not identify in separate counts her "claims arising out of the laws of the Commonwealth of Pennsylvania."

given that there are no extraordinary circumstances which would warrant the exercise of jurisdiction over the pendent state law claims, the Court will decline to exercise supplemental jurisdiction. Accordingly, Pulice's claim for assault and battery, infliction of emotional distress, and malicious prosecution under state law will be dismissed without prejudice. *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992) (once all federal claims have been dropped from the case, the case should either be dismissed or transferred to the Pennsylvania Court of Common Pleas pursuant to 42 Pa. Cons. Stat. Ann § 5103(b)).

IV. CONCLUSION

For the foregoing reasons, the motion summary judgment of Defendant Officers will be granted as to all federal claims, the motion for summary judgment of Allegheny Township and Allegheny Township Police Department will be granted, the motion for summary judgment of Peoples Gas will be granted, and the motion for summary judgment of Trooper King will be granted. Pulice's claims under state law will be dismissed without prejudice. An appropriate order follows.

Lee, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1244

MARIA PULICE,

Plaintiff,

v.

OFFICER J. ENCISO, SGT. T.M. SOLLA, OFFICER DANIEL UNCAPHER, CHIEF DONALD HESS JR., in their capacity as police officers and individually and the ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency and ALLEGHENY TOWNSHIP, a municipal corporation, and PEOPLES NATURAL GAS COMPANY, a Pennsylvania corporation, and PENNSYLVANIA STATE TROOPER PAUL E. KING,

Defendants.

ORDER OF COURT

AND NOW, this 20th day of September, 2001, it is hereby **ORDERED** as follows:

(i) **"Motion by Paul E. King for Summary Judgment"** *(Document No. 90)* is hereby **GRANTED:**

(ii) **"Motion For Summary Judgment"** filed by Officer J. Enciso, Sgt. T.M. Solla, Officer Daniel Uncapher, and Chief Donald Hess Jr." *(Document No. 92)* is **GRANTED** as to all federal claims;

(iii) **"Defendants' Motion for Summary Judgment"** filed by Allegheny County Township and Allegheny Township Police Department *(Document No. 95)* is **GRANTED;**

(iv) **"Motion for Summary Judgment"** filed by The Peoples Natural Gas Company *(Document No. 97-1)* is **GRANTED;** and

(v) Plaintiff's "claims arising out of the laws of the Commonwealth of Pennsylvania" are dismissed without prejudice forthwith.

/s/ Donald J. Lee
Donald J. Lee
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No: 01-3748

MARIA PULICE

Appellant

v.

OFFICER J. ENCISO; SGT. T.M. SOLLA; OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR., in their capacity as police officers and individually; ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency; ALLEGHENY TOWNSHIP, a municipal corporation; PEOPLES NATURAL GAS COMPANY, a Pennsylvania corporation; PAUL E. KING, Pennsylvania State Trooper

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 99-cv-01244)
District Judge: Honorable Donald J. Lee

Argued May 2, 2002

Before: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AMBRO, BARRY, FUENTES and STAPLETON*, *Circuit Judges* and POLLAK**, *District Judge*

* Honorable Walter K. Stapleton, Senior Third Circuit Judges, vote limited to panel rehearing only.

** Honorable Louis H. Pollak, District Court Judge, who sat on the original panel, is limited to panel rehearing only.

The petition for rehearing *en banc* filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: AUG 12 2002

No. 02-725

Supreme Court, U.S.
FILED
DEC 11 2002
CLERK

IN THE

Supreme Court of the United States

MARIA PULICE,
Petitioner,

v.

OFFICER J. ENCISCO; SGT. T.M. SOLLA; OFFICER DANIEL UNCAPHER; CHIEF DONALD HESS, JR.; in their capacity as police officers and individually; ALLEGHENY TOWNSHIP POLICE DEPARTMENT, a municipal agency; ALLEGHENY TOWNSHIP, a municipal corporation; PEOPLE'S NATURAL GAS COMPANY, a Pennsylvania corporation; PAUL E. KING, a Pennsylvania State Trooper,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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U.S. Supreme Court Rule 10 4

PERCEIVED MISSTATEMENTS OF FACT

Petitioner fails to point out that a bystander videotaped the incident in question. Both Petitioner and Respondents relied on this videotape evidence at the trial level and before the Third Circuit Court of Appeals. The videotape shows two days of discussion between the Pulices, the gas company employees and the Allegheny Township Police Officers. The Pulices can be seen and heard arguing vehemently with the police about whether the gas company had the right to work on the property. Donald Hess repeatedly asks the Pulices to step aside and permit the gas company to perform its work. On December 5, 1997, after a period of discussion, Donald Hess advises Maria Pulice, Nunziato Pulice, Sr. and Nunziato Pulice, Jr. that if they do not move, they will be arrested. Nunziato, Jr. can be heard arguing with the police and questioning how he can be arrested since he is on his property. When the Pulices refuse to move, the officers proceed to take them into custody, beginning with Nunziato Pulice, Sr. As the police attempt to remove him from the scene, Petitioner is seen on the videotape attempting to pull him back, making it more difficult for the officers to control the scene and to arrest Mr. Pulice. Once the officers remove him from the immediate area, Petitioner climbs up the hill behind one of the officers who is attempting to remove her son from the hill. Petitioner appears to search for something and then one of the officers, with a shocked and surprised look on his face, yells, "She's got my gun!" Petitioner is then removed from the hill, placed face down on the ground and handcuffed. At no time did any of the officers strike Petitioner. A brief period of time exists where Petitioner cannot be seen on the videotape. However, she can be heard yelling that she wants up and that the police will not let her get up. When Petitioner reappears on the video, she has no visible signs of injury. This is contrary to Petitioner's claims that she was severely beaten.

In addition, Petitioner's medical records do not support her claims that she was severely beaten. It should be noted that both Petitioner and Respondents relied upon Mrs. Pulice's medical records in making their argument to the lower courts.

There is a significant history that led to the incident in question that is not mentioned in Petitioner's statement of the facts. Petitioner and her husband had a dispute with their neighbors concerning the presence of a gas line that ran across the Pulices' property and provided gas service to the neighbors. Peoples Natural Gas Company has an easement for the gas line located on or near the property in question. The Pulices' predecessor in interest granted the neighbors the right to have constructed a domestic high-pressure regulator and meter installation and the right to lay a service line from the said installation across the property to the neighbor's property line. This agreement, dated October 18, 1976, also permitted the gas company a right of ingress and egress to service the installation and read the meter. The Deed of Exchange, which conveyed the property to the Pulices, clearly states that the conveyed premises were subject to a right of way for gas lines servicing the dwelling of the neighbors. A gas meter is located in the area in question. Prior to 1992, the Pulices attempted to prevent the gas company from gaining access to the gas line and meter by covering the gas meter with a wooden box. The Pulices further threatened to forcibly remove from the property any gas company employee who attempted to read or service the meter. This conduct resulted in litigation that was appealed all the way to the Pennsylvania Supreme Court. Pennsylvania's courts held that the Pulices had notice of the easement and that they were enjoined from what the Superior Court of Pennsylvania termed their "petty behavior". *The Peoples Natural Gas Company v. Pulice*, 447 Pa.Super. 644,

668 A.2d 1204 (1995), *alloc. denied*, 544 Pa. 611, 674 A.2d 1074 (1996).

Petitioner and her husband were dissatisfied with the decisions of the courts and so, in a self-help measure, Mr. Pulice cut the gas line, leaving the neighbors without gas service. As a result, gas company employees arrived on December 4, 1997 to reconnect the gas service. Petitioner and her family physically obstructed the area to prevent the gas company from performing its work. Allegheny Township police officers were called to the scene and after a significant period of discussion, the gas company left for the day and no work was performed. At some point, the Allegheny Township solicitor was advised of the situation. The solicitor contacted Petitioner's attorney at the time and advised him that the gas company was conducting operations in the public right-of-way of Copeland Road and instructed him to direct the Pulices not to interfere with the gas company's activities. He also indicated that interference with the gas company's activities could subject the Pulices to arrest. The solicitor also advised the police chief that the gas company had a right of way in the area in question and that the Pulices were not permitted to obstruct it. The solicitor told the police chief that the Pulices should be arrested if they persisted in their obstructionist tactics.

Following the incident in question, Petitioner was charged with disorderly conduct per 18 Pa.C.S. §5503(a)(1), resisting arrest per 18 Pa.C.S. §5104, simple assault per 18 Pa.C.S. §2701(a)(3) and obstructing a highway or other public passage per 18 Pa.C.S. §5507(a). She pled guilty to simple assault. She also pled guilty to obstructing a highway or other public passages after said charge, which is a third degree misdemeanor, was reduced to a summary violation. As a result of these guilty pleas, Petitioner was placed on

adult probation for one (1) year and was ordered to undergo a mental health evaluation.

PETITIONER HAS FAILED TO SET FORTH A COMPELLING REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI

Granting a Petition for Writ of Certiorari is within the Court's discretion and is usually granted where there is a conflict among the Circuit Courts on the same important matter, where a state court of last resort has decided an important federal question in a way that conflicts with the question of another state court of last resort or of a United States Court of Appeals or where an important question of federal law has been decided by another court that has not been but should be settled by the U.S. Supreme Court or has made a decision that is in conflict with a US Supreme Court decision. U.S. Supreme Court Rule 10. Petitioner has raised two areas where she believes the Third Circuit Court has erred. First, Petitioner states that she believes that the Circuit Court applied an improper standard of review to the Motions for Summary Judgment that were filed in the trial court. Second, Petitioner believes that the lower courts have misapplied the holding of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001). These issues will be addressed more fully below. However, neither of them sets forth an issue that indicates that there is a conflict among the circuits on an important federal issue of law or that there is a conflict with a decision rendered by this Honorable Court.

SUMMARY JUDGMENT STANDARD OF REVIEW

Petitioner suggests that the lower courts applied an improper standard of review in determining Respondents' Motion for Summary Judgment by making factual and credibility determinations where there were disputed and

contested issues of fact. A careful review of the record shows that Petitioner conducted no discovery in this case at the trial court level. As the trial court points out, Petitioner's case rests almost entirely upon a series of unsubstantiated, conclusory statements and the allegations set forth in the Amended Complaint.

The lower courts did not make factual and credibility determinations as alleged by Petitioner. Rather, the lower courts made their decisions based upon the evidence of record as a whole. Summary judgment is appropriate where the moving party can demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A scintilla of evidence in support of the non-moving party's position will be insufficient. There must be evidence on which the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252. The court must view the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. The trial court is not required to treat Petitioner's allegations as being true where the Respondents' properly supported motion for summary judgment provides hard evidence that the allegations against them in the Complaint are demonstrably false. See, *Skousen v. Brighton High School*, 305 F.3d 520, 528 (6th Cir. 2002).

In order to defeat a motion for summary judgment, the non-moving party must do more than rest on mere

allegations, allusions to facts or references to pleadings. Rather, the non-moving party must offer specific material evidence that not only contradicts the evidence presented by the moving party but is also sufficient to establish the existence of a material factual dispute that must be decided at trial. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). In this case, both the videotape evidence and Petitioner's medical records contradict her assertion that she was brutally beaten and Petitioner has not introduced any evidence to the contrary. Petitioner has also failed to introduce evidence that contradicts Respondents' assertion that Petitioner attempted to obtain an officer's gun after she and her family were placed under arrested. Although there are some disputes as to the facts, the material facts, as supported by evidence relied on by both Petitioner and Respondents, are not in dispute. Further, Petitioner has not presented evidence to establish the existence of a material fact that must be decided at trial. Therefore, summary judgment was properly granted to Respondents in this case.

QUALIFIED IMMUNITY

The Circuit Court properly affirmed the District Court's determination that the individual officers involved in arresting Petitioner on December 5, 1997 are entitled to qualified immunity. Pursuant to the decision in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in order to determine whether an officer is entitled to qualified immunity, the court analyzed the specific facts of the case before it. The relevant dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation that he confronted. An officer is entitled to qualified immunity from claims of excessive force where a reasonable person in the officer's

position could have believed the degree of force employed to have been reasonable. *Rogers v. Powell*, 120 F.3d 446 (3rd Cir. 1997); *Fortunato v. Handler*, 969 F. Supp. 963, 968 (W.D. Pa. 1996). The inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is distinct from the inquiry on the merits of the excessive force claim. If an officer is mistaken regarding the amount of force that is legal, but such mistake is reasonable, then the officer is entitled to the immunity defense. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2158-2159.

Government officials performing discretionary functions within the scope of their employment are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Sharrar v. Felsing*, 128 F.3d 810 (3rd Cir. 1997); *Fortunato v. Handler*, 969 F.Supp. 963 (W.D. Pa. 1996). Qualified immunity from a civil rights action is an entitlement not to stand trial or face the other business of litigation. The privilege of qualified immunity is an immunity from suit rather than a mere defense to liability. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

A court required to rule on qualified immunity of a government official in a civil rights action must first consider, as its initial inquiry, whether the facts alleged, taken in a light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156. If the court determines that a favorable view of the plaintiff's alleged facts show that the official's conduct violated a constitutional right, the court's next step is to ask whether such right was clearly established. In making this

determination, the court must analyze the specific facts of the case pending before it. The relevant dispositive inquiry is whether it would be clear to a reasonable official that his conduct was unlawful in the situation that he confronted. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156. If the law did not put the official on notice that his conduct would be clearly unlawful, then summary judgment based on qualified immunity is appropriate. *Id.*

Under the Fourth Amendment, the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat to effect it. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-1872, 104 L.Ed.2d 443 (1989). The *Graham* court recognizes that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and the calculus for reasonableness must allow for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872.

As the lower courts indicate, Petitioner's allegations in her Complaint are sufficient to set forth the possibility of a constitutional violation based simply on the general rule prohibiting excessive force. However, Petitioner has failed to produce any evidence of record to support her claims. To the contrary, the evidence of record overwhelmingly supports the proposition that no excessive force was used against Petitioner by any of the officers. The right to use a certain degree of force must be carefully analyzed in light of the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or

attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1872.

In this case, the evidence of record is clear that the Allegheny Township police officers did not use excessive force when they arrested Petitioner. Petitioner escalated the situation the officers faced when she attempted to grab a gun from one of the officer's holsters. As the situation escalated, the officers initially had no idea whether Petitioner actually obtained the weapon or what she planned on doing with it once she obtained it. Petitioner's actions in actively resisting arrest and in attempting to take an officer's gun placed every person in the immediate vicinity in danger and the officers were required to use a significant amount of force to restore order and gain control of the situation. The fact that the officers would not permit Petitioner to get up once they had her face down and that one of the officers had his knee in her back is reasonable from the perspective of the officers at the time. The officers, who were surprised once by Petitioner's attempt to obtain an officer's gun, had no idea of Petitioner's intentions or what her actions would be if she had been permitted to get up once she had been subdued by the officers. The officers' actions, in taking Petitioner into custody, placing her on the ground, refusing to permit her to get up and handcuffing her were objectively necessary in order to control the scene and to prevent harm to the officers and to the numerous bystanders in the area. Under the rationale of *Saucier*, the officers are entitled to qualified immunity and the lower courts' decisions concerning qualified immunity are consistent with the decisions of the other Circuit Courts in their interpretation of *Saucier* and its progeny. Further, the lower courts' decisions were not in conflict with any decisions rendered by this Court concerning qualified immunity as it applies to Fourth Amendment claims.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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